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NO. 93-1313

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PATRICIA L. WHITE,
Petitioner

v.

RUNYON, POSTMASTER GENERAL,
Respondent.

BRIEF AMICI CURIAE OF THE WOMEN'S LEGAL DEFENSE FUND, ACLUF WOMEN'S RIGHTS PROJECT, NATIONAL ORGANIZATION FOR WOMEN, NATIONAL WOMEN'S LAW CENTER, and NOW LEGAL DEFENSE AND EDUCATION FUND

IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF AMICI CURIAE

Amici Curiae, who submit this brief with the consent of all parties in support of Petitioner, are non-profit advocacy organizations that work, *inter alia,* to enforce the laws prohibiting sex discrimination, including pregnancy discrimination, in employment. Individual Statements of Interest of *Amici* are attached as an Appendix to this brief.[1]

REASONS FOR GRANTING THE WRIT

The Fourth Circuit erroneously sustained as nondiscriminatory a policy and practice of the United States Postal Service ("USPS") under which workers on rural routes temporarily disabled by occupational injuries or illness have greater access to "light duty" assignments than workers temporarily disabled by non-occupational illness or injuries -- such as pregnancy.[2] The USPS policy and practice of distinguishing between on and off-the-job disabilities to determine eligibility for medically necessary reduced duty assignments operates to exclude pregnant women on rural routes from paid alternative work

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1 *Amici* would like to thank the law firm of Piper & Marbury for its *pro bono* assistance with the preparation and printing of this brief.

2 The Fourth Circuit failed to entertain plaintiff's argument that the USPS policy violated the PDA on the ground that it was not the basis of the trial court's ruling in favor of the plaintiff below. The Court of Appeals' refusal to consider this claim contravenes the well-settled practice of the appellate courts to permit the prevailing party in the trial court to defend the judgment on any ground appearing in the record "whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams,* 397 U.S. 471, 475 n. 6 (1970); *Colautti v. Franklin*, 439 U.S. 379, 397 n. 16 (1979).

assignments available to other disabled employees. Thus, the Fourth Circuit erred in accepting this policy as a "legitimate nondiscriminatory reason" sufficient to discharge the defendant's burden of production under Title VII.[3]

The Fourth Circuit's refusal to examine the legality of this policy under the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k), will have far-reaching implications for many women workers. Since the USPS is a national employer, the policy potentially limits the work opportunities of thousands of women postal workers on rural routes who may become temporarily disabled due to pregnancy during their employment. Moreover, should distinctions like those made by the USPS policy remain unchecked, all employers, public and private, will be able to adopt with impunity policies that put pregnant workers whose families are especially in need of continued economic security at greater risk of losing their incomes than workers temporarily disabled by other medical conditions that similarly affect their ability to work.[4]

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[3] We also believe the court below erred in its analysis of the plaintiff's sex discrimination claim under *St. Mary's Honor Ctr. v. Hicks*, ___ U. S. ___, 113 S. Ct. 2742 (1993), and we fully support the petitioner's arguments that review is necessary on that ground as well. *See Petition for Writ of Certiorari* at 19-22. However, this brief will solely address the PDA argument.

[4] Family economic security depends increasingly on the earnings of women. The Bureau of Labor Statistics reports that 67% of women with children under 18 and 66% of women who head households with children under 18 are in the labor force. U.S. Department of Labor, Bureau of Labor Statistics, *Current Population Survey: March 1993*. In 1992, nearly 60% of all married couples reported both spouses working. U.S. Department of Commerce,

SUMMARY OF ARGUMENT

The plain language of the PDA, its legislative history, and the EEOC's interpretive guidance all make clear that pregnant workers must be treated the same as non-pregnant workers similar in their ability or inability to work with respect to access to reduced or alternative duty assignments. USPS attempted to justify its denial of plaintiff's request for light duty by citing its policy of distinguishing between occupational and non-occupational disabilities in assigning light duty. However, this policy operates to exclude all pregnant women from paid alternative duty assignments available to other disabled workers. The Fourth Circuit erred in failing to address the discriminatory nature of this policy and practice.

ARGUMENT

I. INTRODUCTION

Three times during her employment as a rural letter carrier at the Annapolis Post Office, the plaintiff, Ms. White, was denied the opportunity to work "light duty" as recommended by her physician when she became temporarily disabled from working all of her regular duties due to pregnancy. 3 J.A. at 392, 442, 470-475. USPS based its denial on a provision of the USPS collective bargaining agreement with the National Rural Letter Carriers Association ("NRLCA"). 2 J.A. at 325. The

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Bureau of the Census, Current Population Reports, Series P60-184, *Money Income of Households, Families, and Persons in the United States: 1992.*

contract expressly prohibits "light duty" assignments to those on rural routes disabled by non-occupational illnesses or injuries -- such as pregnant workers -- yet expressly permits "limited duty" assignments to accommodate workers disabled by on-the-job injuries or illnesses. 2 J.A. at 307.[5]

USPS refused Ms. White's light duty requests because it interpreted the contractual provision prohibiting light duty on "regular rural routes" to mean that no light duty was allowed for rural carriers. 3 J.A. at 667-669. The Court of Appeals held that although USPS's interpretation of the contract was erroneous, its misinterpretation of the agreement alone did not constitute a violation of Title VII. Slip op. at 8. However, the Court of Appeals erred by failing to entertain Ms. White's argument that the policy advanced by USPS as its "legitimate, non-discriminatory reason" was itself discriminatory under the PDA.[6]

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5 Under USPS policy, both "light duty" and "limited duty" assignments are officially assigned duties requiring less exertion than an employee's normal duties for which the employee is compensated. 2 J.A. at 368. Without access to light or limited duty, temporarily disabled workers, which in this context is meant to include those who are still able to assume some duties, must use up their sick or annual leave or take unpaid leave to cover their periods of disability. USPS acknowledged that there is no substantive difference between the two terms. 3 J.A. at 368.

6 Indeed, the policy may violate other anti-discrimination laws as well. A recent Department of Labor decision held that an employer's blanket "no light duty" policy violated Section 503 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled employees. *OFCCP v. Cissel Mfg. Co.*, DOL Labor Case No. 87-OFC-26 (February 14, 1994). Section 501, an analogous provision of the Rehabilitation Act that covers the USPS as well as the federal government, may also be implicated, along with the Americans with

II. THE PREGNANCY DISCRIMINATION ACT WAS ENACTED TO PROHIBIT DISCRIMINATION AGAINST PREGNANT WOMEN AND, IN PARTICULAR, TO PREVENT PREGNANT WOMEN FROM BEING FORCED TO TAKE INVOLUNTARY LEAVE WHEN THEY REMAIN ABLE TO WORK.

The USPS policy, which denies workers on rural routes disabled by pregnancy the opportunity to work light or limited duty, directly clashes with the plain language and the goals of the PDA. The PDA states that

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work...."

42 U.S.C. § 2000e(k).

The PDA was enacted to prevent women from being fired or denied an employment-related opportunity merely because of pregnancy. *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987) (the PDA was added to Title VII "to prevent the differential treatment of women in all aspects of employment based on pregnancy"). By enacting the PDA, Congress unequivocally recognized that discrimination against an employee on the basis of pregnancy is sex discrimination in

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Disabilities Act, which prohibits private and public employers from discriminating against disabled individuals.

violation of Title VII. *International Union, UAW v. Johnson Controls, Inc.* 499 U.S. 187 (1991). As this Court recognized in *Johnson Controls*, the PDA clarifies that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." 499 U.S. at 204.[7] Thus, the PDA makes it unlawful to discriminate against any individual with respect to terms, conditions or privileges of employment because of or on the basis of pregnancy.

One of the key goals of the PDA was to prevent employers from forcing pregnant women to take involuntary leave when they were able to work. The Senate Report on the PDA notes that "perhaps the most important effect of the PDA is to prohibit employer policies which forced women who became pregnant to stop working regardless of their ability to continue.... For, as the history of sex discrimination shows, such policies have long-term effects upon the careers of women and account in large part for the fact that women remain in low-paying, dead-end jobs." S. Rep. No. 331, 95th Cong. 2d Sess. 6 (1978); *See*

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[7] The need to protect the economic security of pregnant workers and their families by enforcing their right to earn an income during pregnancy is no less critical today than it was in 1978 when the PDA was enacted. Involuntary departure from the workforce through discharge or forced unpaid leave in the months just before childbirth can mean the difference between just getting by and poverty for dual and single-parent households alike. For the working women who comprise the majority of low-wage workers, every paycheck counts. In 1992, approximately 70% of all women workers earned less than $20,000 per year; approximately 40% of all women workers earned less than $10,000 per year. U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P60-184, *Money Income of Households, Families, and Persons in the United States: 1992*.

also, *Carney*, 824 F.2d at 646-647 (citing pertinent legislative history). By ensuring that pregnant workers are "treated the same" as non-pregnant workers, Congress meant to include "employer practices of transferring workers to lighter assignments so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work." H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

The Equal Employment Opportunity Commission's interpretive guidelines on the PDA also establish that "same" treatment under the PDA encompasses opportunities for reduced or alternative work assignments so that a pregnant employee can continue to work:

> 5. Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?
>
> A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

. . . .

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

. . . .

29 C.F.R. § 1604, App. at 201 (1993) (Questions and Answers on Pregnancy Discrimination Act). The plain language of the PDA, its legislative history, and the enforcement agency's interpretive guidance all make clear that pregnant workers must be treated the same as similarly disabled non-pregnant workers with respect to access to reduced or alternative duty assignments.

III. THE USPS POLICY AND PRACTICE OF DISTINGUISHING BETWEEN TYPES OF DISABILITIES EXCLUDES PREGNANT WOMEN ON RURAL ROUTES FROM PAID ALTERNATIVE DUTY WORK ASSIGNMENTS.

Within the scope of the PDA are "policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities." *Maganuco v. Leyden Community High School Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991). Courts must thus compare a policy's effect on pregnant persons with its effect

on "other persons not so affected but similar in their ability or inability to work." *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992), *cert. denied*, __U.S.__, 113 S.Ct. 60 (1992) (comparing treatment of pregnant plaintiff to treatment of other employees requesting accommodation under employer's policy). The policy of USPS in this case operates to exclude all pregnant women from paid alternative work assignments available to other disabled workers in violation of the PDA.[8]

To explain its treatment of Ms. White, the USPS relied on its policy prohibiting light duty assignments on rural routes for employees temporarily disabled by non-occupational injuries or illnesses. Yet, the USPS denied light duty to the plaintiff and put her involuntarily on unpaid "off-duty" status, while it granted paid limited duty status to other workers on rural routes whose similar temporary disabilities were not related to pregnancy but were caused by injuries on the job.[9] Ms. White was no different in her ability or inability to work than these other employees disabled for reasons other than pregnancy.

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[8] Moreover, evidence in the record ignored by the Fourth Circuit indicates that the USPS accommodated a male worker who had a *non*-occupational illness (*i.e.*, a heart condition) with a light duty assignment yet failed similarly to accommodate Ms. White during any of her three pregnancies. 3 J.A. at 521-522, 526-527, 603, 686.

[9] The contract uses the term "limited duty" in reference to reduced duty for occupational disabilities and "light duty" in reference to reduced duty for other disabilities. However, as indicated in n.4, *supra*, the USPS acknowledged that there is no substantive difference between the terms. 2 J.A. at 368.

The USPS policy has a disparate impact on pregnant employees since it *always* operates to preclude them from obtaining reduced duty assignments. *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981) (policy permitting a maximum of ten days for disability leave affected women employees more severely than male employees). Because pregnancy is not a work-related disability under USPS policy, pregnant women *cannot* be granted light duty status on rural routes to accommodate their pregnancy-related disabilities on the same basis as other temporarily disabled workers. Thus, the policy would *always* operate to prevent pregnant women on rural routes from paid alternative work assignments available to other disabled employees. As a result, women temporarily disabled by pregnancy, unlike other temporarily disabled workers, are always, like Ms. White, forced into unpaid off-duty status (and/or to exhaust sick or annual leave) in lieu of a paid alternative assignment.[10]

An even more alarming consequence of such a policy is that pregnant women whose physicians advise reduced duty may be forced to choose between their paychecks and their health if paid alternative assignments

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[10] As noted above, the application of this policy threatens the economic security of pregnant workers and their families. *See* n. 6, *supra*. For the majority of women workers who are low-wage earners, the economic consequences of a loss of income during pregnancy are significant. In 1988, only 20% of all working women were covered by paid pregnancy disability leave policies which provide income for the entire period of actual disability (usually six weeks). Institute for Women's Policy Research, *"Improving Employment Opportunities for Women Workers" An Assessment of the Ten Year Economic Impact of the Pregnancy Discrimination Act of 1978"* (1990).

are not available to them.[11] A policy that forces a choice between losing one's paycheck or risking one's health "clashes violently with the letter as well as the spirit of Title VII." *Abraham*, 660 F.2d at 819.

USPS's reliance on the distinction between occupational and non-occupational disabilities as a "legitimate nondiscriminatory reason" justifying its denial of light duty to Ms. White thus violates the PDA because such a distinction has a disparate impact on pregnant women by always operating to exclude them from light duty assignments and because USPS failed to present evidence of a business justification showing that this distinction serves in some significant way its legitimate employment goals.[12]

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[11] *See, New York City Transit Auth. v. State Div. of Human Rights*, 577 N.E.2d 40, 41 (N.Y. 1991) (court upheld liability finding and damages awarded to pregnant bus driver for Transit Authority's discriminatory denials of her requests for light duty when she suffered complications where bus driver determined that she could not afford to be without a paycheck for seven months, worked full duty, and then miscarried.)

[12] On its face, the PDA makes no exception for occupational disabilities; the law clearly prohibits employers from treating pregnancy-related disabilities differently than "*other*" disabilities -- no matter how (or where) they are sustained. As long as alternative duty assignments are available to workers partially disabled for reasons other than pregnancy, pregnant workers who are similar in their ability or inability to work should be afforded the same opportunity. *Carney*, 824 F.2d at 648. The fact that some non-pregnant workers on rural routes (*i.e.*, workers with other non-occupational disabilities) may also be excluded from access to light duty work under the USPS policy does not mean the policy is non-discriminatory. *EEOC v. Board of Governors of State Colleges and Univ.*, 957 F.2d 424, 430-431 (7th Cir. 1992), *cert. denied*, ___U.S.___, 113 S. Ct. 229 (1992) (rejecting argument that a policy imposing adverse treatment on all members of a

The Court of Appeals erroneously let stand a policy and practice that discriminates against pregnant workers in that it always operates to exclude pregnant women from paid alternative work assignments available to other disabled workers. Such a policy and practice should not be allowed to stand.

protected class was rendered non-discriminatory by the inclusion of some members outside the protected class).

CONCLUSION

For reasons presented above, we urge the Court to review this case to correct the error of the Court of Appeals or, should the Court decide that a fuller exposition of the issues involved in the PDA claim is necessary, to remand for a full hearing on the PDA issue.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

The **Women's Legal Defense Fund** ("WLDF") is a non-profit, tax-exempt, national advocacy organization that works at the federal and state levels to develop and promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 23-year history, WLDF has placed special emphasis on equal employment opportunity, including pregnancy discrimination, pay equity, and sexual harassment, by monitoring agencies' EEO enforcement, challenging sex-based discrimination in the courts, and leading efforts to promote employment policies such as the 1993 Family and Medical Leave Act and the 1978 Pregnancy Discrimination Act (PDA). Since the passage of the PDA, WLDF has been a leading advocate for its effective interpretation and enforcement because of its centrality to equal employment opportunity for women.

The **ACLUF Women's Rights Project** ("Women's Rights Project") is dedicated to the advancement of the rights and interests of women in American society. The Women's Rights Project has been an active participant in virtually all of the major gender discrimination litigation in this Court, in Congressional and public education efforts to remedy gender discrimination, and other endeavors on behalf of women. This case implicates fundamental principles and laws relating to one of the most common forms of gender discrimination the pervasive problem of

pregnancy discrimination, which, like many other forms of gender discrimination, interferes impermissibly with the economic rights of women workers.

The **National Organization for Women** ("NOW") is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination against pregnant women.

The **National Women's Law Center** ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. The Center has a particular interest in the eradication of sex discrimination in employment, including discrimination on the basis of pregnancy. Since 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights

organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sex discrimination and pregnancy discrimination in violation of Title VII. In furtherance of that goal, NOW LDEF produces information kits and litigates cases to enforce Title VII.